

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

JUN - 5 1997

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications Act
of 1996

CC Docket No. 96-128

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

ERRATA

On June 3, 1997, American Public Communications Council ("APCC"), by its attorneys, submitted its Comments on the Petition of Telco Communications Group, Inc. for Waiver of Section 64.1301 of the Commission's Rules. APCC would like to correct the following errors and omissions (corrected copies of the complete filing are attached).

These errata amend APCC's Comments as follows:

Add a Table of Contents;

Amend p. 4, line 1, by deleting the space after "... part-flat ... and deleting space before ... rate ...";

Amend p. 6, line 5, by changing "... Accordingly ..." to "... Accordingly, ...";

Amend p. 6, footnote 4, line 8, by changing "... Sprint ..." to "... Sprint, ...";

Amend p. 6, footnote 4, line 13, by changing "... Reclassification ..." to "... Reclassification ...";

Amend p. 7, subheading B, by changing "... Deprive PSPs ..." to "... Deprive PSPs of Prescribed Interim Compensation ...";

No. of Copies rec'd
List A B C D E

014

Amend p. 7, line 7, by changing "... Waiver ..." to "... waiver ...";

Amend p. 7, line 7, by changing "... not receiver ..." to "... not receive ...";

Amend p. 7, line 10, by changing "... opt otu fo ..." to "... opt out of ...";

Amend p. 7, by changing in footnote 5, "... comepnstion ..." to "... compensation ...";

Amend p. 10, line 6, by adding a footnote after "... from the LECs." "... [Footnote 7] See, e.g., Letter to Regina M. Keeney from E.E. Estey, AT&T, May 23, 1997 ...";

Amend p. 11, line 11, by changing "... ~~after~~ ..." to "... *after* ...";

Amend p. 11, line 16, by changing "... IPP providers ..." to "... PSPs ...";

Amend p. 12, line 14, by changing "... Commission retroactively ..." to "... Commission to retroactively ...";

Amend p. 12, line 16, by changing "... if at ..." to "... if at ...";

Amend p. 14, line 9, by deleting "... whole ...";

Amend p. 14, lines 15-16, by adding and centering on the page "... * * * ...";

Amend p. 14, line 18, by changing "... regulations. Ad hoc ..." to "... regulations. Ad hoc ...";

Amend p. 15, line 2, by changing "... based on exemption ..." to "... based on a statutory exemption ...";

Amend p. 15, line 2, by changing "... Excel ..." to "... Allnet, Excel ...";

Amend p. 15, line 4, by inserting the following citation: "... Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd 11457 (1995), 12 FCC Rcd 2571 (1997) ...";

Amend p. 15, line 15, by changing "... contravention of standards of law ..." to "... contravention of law ...".

A corrected copy of APCC's Comments is attached.

Dated: June 5, 1997

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich
Christopher T. McGowan

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public
Communications Council

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

JUN - 5 1997

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)
_____)

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

CC Docket No. 96-128

**COMMENTS OF AMERICAN PUBLIC COMMUNICATIONS COUNCIL ON
THE PETITION OF TELCO COMMUNICATIONS GROUP, INC. FOR
WAIVER OF SECTION 64.1301 OF THE COMMISSION'S RULES**

Albert H. Kramer
Robert F. Aldrich
Christopher T. McGowan
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

Attorneys for the American Public
Communications Council

June 5, 1997

TABLE OF CONTENTS

PAGE NO.

	SUMMARY	i
	BACKGROUND	1
I.	THE PAYPHONE ORDER DID NOT AUTHORIZE WAIVERS FROM THE INTERIM COMPENSATION RULES WITHOUT PSPs' CONSENT	3
II.	TELCO'S REQUEST DOES NOT MEET THE COMMISSION'S GENERAL WAIVER STANDARDS	4
A.	Telco Has Shown No Compelling Circumstances Warranting A Waiver	5
B.	Granting Telco's Waiver Will Illegally Deprive PSPs of Prescribed Interim Compensation	7
C.	Granting Per-Call Waivers Would Deprive PSPs of the Opportunity to Prepare for Per-Call Compensation	9
III.	IF ANY WAIVER IS GRANTED, IT MUST BE PROSPECTIVE ONLY	10
A.	A Retroactive Waiver Is Not Authorized by Law	11
B.	A Retroactive Waiver Is Not Justified	12
	CONCLUSION	15

SUMMARY

Telco's request for a per-call compensation waiver fails to meet the requirements of the Commission's Payphone Orders or the general standards for waiver of Commission rules. While Telco implies that the Commission authorized per-call compensation waivers during the interim period, the Commission expressly limited such authorization to waivers filed pursuant to agreements with payphone service providers ("PSPs").

Telco's request fails to show any "special circumstances" that would justify its requested waiver and enable the Commission to articulate a standard to prevent waivers from eviscerating the interim compensation rule. The fact that Telco pays more compensation on a flat-rate basis than it would pay on a per-call basis does not differentiate Telco from numerous other interexchange carriers ("IXCs"). Telco's waiver alone would effectively and illegally amend the interim compensation rule, to the detriment of PSPs, by reducing the compensation prescribed under the rule. If other IXCs are also allowed to choose their form of compensation at will, PSPs will be utterly deprived of the fair compensation to which they are entitled under Section 276 of the Act.

In order to ensure that PSPs receive their prescribed interim compensation, the Commission would have to modify the flat-rate compensation obligations of other IXCs, simultaneously with Telco's waiver. At a minimum, the procedural complexities raised by such an effort would outweigh any public interest benefit of the waiver and undermine the Commission's purpose to promote ease of administration in the interim compensation period.

Finally, granting a waiver to Telco would undermine the purposes of the interim compensation rule by depriving PSPs of a reasonable opportunity to prepare for per-call compensation.

Retroactive application of a waiver is even more unjustified. Telco's delay in requesting a waiver has unnecessarily increased the unfairness and burden on all parties. Further, a retroactive waiver is unauthorized and unjustified under applicable law. Finally, all the problems discussed above would be greatly worsened by a retroactive waiver.

For all the foregoing reasons, Telco's waiver request should be denied.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

**COMMENTS OF AMERICAN PUBLIC COMMUNICATIONS COUNCIL ON
THE PETITION OF TELCO COMMUNICATIONS GROUP, INC. FOR
WAIVER OF SECTION 64.1301 OF THE COMMISSION'S RULES**

In response to the Commission's Public Notice, DA 97-943 (released May 13, 1997), the American Public Communications Council ("APCC") submits these comments on the petition of Telco Communication Group, Inc. ("Telco") for waiver of Section 64.1301 of the Commission's rules. For the reasons set out below, the Commission should deny Telco's waiver request.

BACKGROUND

Section 276 of the Communications Act of 1934, 47 U.S.C. § 276, as amended, requires that all payphone service providers ("PSPs") be fairly compensated for each and every call made from their payphones. In its payphone Order,¹ the Commission established

¹ In the matter of the Pay Telephone Reclassification and Compensation provisions of the Telecommunication Act of 1996, Report and Order, CC Docket No. 96-128 (rel. Sept. 20, 1996) ("Order"), Order on Reconsideration, CC Docket No. 96-128 (rel. Nov. 8, 1996) ("Reconsideration").

a compensation system whereby PSPs must be compensated by interexchange carriers ("IXCs") for the use of their payphones to make access code and subscriber 800 calls.²

The Commission decided that this compensation ultimately should be paid on a per-call basis. However, the Commission found that it would not be technically feasible to implement a per call compensation mechanism in the first year. The Commission found that an interim period was needed to allow all parties to develop and deploy the necessary tracking capabilities. The Commission therefore established a one-year interim compensation period. During this brief interim period, PSPs would be compensated at a flat rate per payphone per month. See Order ¶¶ 119-126.

For the interim compensation period, the Commission determined that in order to be fairly compensated for the use of their payphones, each PSP should receive \$45.85 per month for each of its payphones. The \$45.85 figure was reached by taking what the record indicated was the average number of phone calls made in a month from a competitive payphone (131) and multiplying by \$.35 per call. In order to adequately compensate PSPs during the interim compensation period, each carrier subject to interim compensation would be required to contribute its pro rata share (based on overall long distance market shares) of the flat rate of \$45.85 per payphone per month.

² The Commission's earlier consideration of the Telephone Operator Consumer Services Improvement Act ("TOCSIA") led to the creation of a compensation mechanism whereby each competitive payphone was compensated at the rate of \$6.00 per month. The Order's interim compensation system is structured in a similar fashion to the TOCSIA system.

The Commission explicitly considered and rejected a proposal to require those carriers that already have call tracking capability to pay compensation during the interim period on a per-call basis, while other carriers paid on a flat-rate basis. The Commission found that such a system would be inconsistent with the "ease of administration" of the interim compensation regime. Reconsideration, ¶ 129. The Commission found that "the requested modification would impose greater transaction costs for all parties that outweigh its benefits," especially since "the flat-rate compensation is an interim compensation method that is scheduled to terminate in a year." *Id.*

In rejecting a system whereby some IXC's pay on a per-call basis while others pay on a flat-rate basis, the Commission specifically ruled that individual carriers and PSPs could mutually *agree* to payments of per-call compensation in lieu of some or all of the IXC's share of the interim flat rate. Reconsideration, ¶ 129. Only where carriers and PSPs entered into such agreements, did the Commission say it would consider requests for waiver of its interim compensation rule.

DISCUSSION

I. THE PAYPHONE ORDER DID NOT AUTHORIZE WAIVERS FROM THE INTERIM COMPENSATION RULES WITHOUT PSPs' CONSENT

Telco's petition incorrectly suggests that the Reconsideration Order contemplated granting unilateral waiver requests by IXC's to pay compensation on a per-call basis. Telco Petition at 3. While the Commission did, as Telco asserts, recognize that some carriers may have the ability to track calls in advance of the transition to per-call

compensation, the Commission specifically declined to set up a part-per-call/part-flat-rate system based on the capabilities of particular IXC's. Order, ¶ 119. The *only* waivers contemplated by the Commission are waivers sought by a carrier which has mutually agreed with PSPs to pay some or all of its obligation on a per-call basis. Telco neglects to mention in its petition this critical aspect of the Commission's stated policy with regard to waivers of its interim flat-rate compensation scheme. Telco does not represent that it has entered into any agreement with a PSP and therefore there is no basis for granting to Telco the type of waiver the Commission envisioned.³

II. TELCO'S REQUEST DOES NOT MEET THE COMMISSION'S GENERAL WAIVER STANDARDS

Any applicant for waiver of an agency rule faces a "high hurdle" when seeking to avoid the specific application of a generally applicable determination. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The applicant must clearly demonstrate that the application of a general rule to the applicant's special circumstances is not in the public interest and that the grant of the waiver will not undermine the public policy served by the rule. AT&T Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, 88 FCC 2d 1, 5 (1981). Further, the grant of a waiver must be made pursuant to "an 'appropriate general standard'" in order to "prevent discriminatory application and to put future parties on notice as to its operation." Northeast Cellular

³ By contrast, a per-call waiver was granted to AT&T in CC Docket 91-35 after AT&T and the payphone industry reached an agreement to pay compensation at a specified per-call rate on all calls, including calls not then covered by the FCC compensation rules. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd 1590 (1994).

Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990), quoting WAIT Radio at 1159.

Telco has not shown that special circumstances peculiar to Telco justify the grant of a waiver. No standard has been articulated that would prevent additional IXC's from demanding and receiving additional waivers, thereby eviscerating the rule. *Id.* Further, the effect of granting waivers to Telco and similarly situated carriers would be to deprive PSPs of the compensation to which they are entitled, thereby completely undermining the purpose of the rule.

**A. Telco Has Shown No Compelling Circumstances
Warranting A Waiver**

Telco's waiver claim rests on its assertion that under flat-rate compensation, Telco is required to pay compensation at a higher rate than it would under a per-call compensation plan. These circumstances are not "special" to Telco. As a matter of logic, under interim flat-rate compensation, some carriers inevitably will pay more than they would under the per-call scheme, while others will pay less.

In response to an analogous argument, the Commission denied a request to exclude "low-usage" payphones from receiving interim flat-rate compensation. The Commission recognized that while some payphones might be "under-compensated" and others "over-compensated," such variations are inherent in a flat-rate scheme based on average call volumes. Reconsideration ¶ 127. The same logic applies to IXC's. During the interim compensation period, some IXC's will pay more than they would on a per-call basis,

and some will pay less. However, the flat rate must be paid by all the carriers covered by the rule in order to ensure that PSPs are compensated at the prescribed level of \$45.85 per month.

Nothing else in Telco's request describes special circumstances unique to Telco.⁴ Accordingly, there is nothing in Telco's request that enables the Commission to articulate an "appropriate general standard" to prevent other IXC's from demanding and receiving similar per-call waivers. If any IXC can obtain such a waiver by showing that the IXC pays more under flat-rate than per-call compensation, then roughly half the IXC's would be entitled to per-call waivers.

In short, Telco's waiver request presents no "special circumstances." Instead, Telco proposes a classic example of the "standardless waiver" that ultimately eviscerates the rule. As discussed below, the consequences of granting Telco's and similar IXC waiver

⁴ Telco's reliance on past FCC decisions granting waivers to allow various IXC's to pay per-call compensation is misplaced. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd 1590 (1994); 10 FCC Rcd 5490 (1995); 12 FCC 2571 (1997). Those waivers only addressed compensation obligations under CC Docket No. 91-35, pursuant to Section 226 of the Act. 47 U.S.C. § 226. Further, in granting waivers to AT&T and Sprint, the Commission found that special circumstances were present because the FCC had not even determined whether call tracking was feasible. In that context, the ability of AT&T, and later Sprint, to track calls may have constituted "special circumstances." Today, however, there is no reason to believe that Telco is the only carrier that has or will develop per-call tracking capability prior to the November 1997 effective date. AT&T and Sprint, for example, already have deployed the capability for tracking access code calls. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd. 6716 (1996) at ¶ 29. The designation of the November 1997 effective date presumably has provided an incentive for all carriers to deploy full call tracking capabilities as early as possible.

requests would be not only to eviscerate (and, indeed, effectively repeal) the compensation rule, but also to deprive PSPs of the compensation to which they are entitled under Section 276.

B. Granting Telco's Waiver Will Illegally Deprive PSPs of Prescribed Interim Compensation

The Commission determined that \$45.85 per payphone per month is the proper amount to compensate PSPs during the interim compensation period. If the Commission grants Telco's waiver, PSPs will not receive the prescribed interim compensation. The Commission will have violated its own rule.⁵ For this reason alone, the waiver must be denied.

Further, if the Commission allows IXC's such as Telco to opt out of the flat rate essentially at will, PSPs will not be fairly compensated as Congress intended. Obviously, only those IXC's which will pay less money under per-call will choose to pay per-call compensation. The IXC's which will be paying more under the per-call rules will stay with the flat-rate during the interim period. The clear result is that PSPs will receive substantially lower compensation per month than the Commission prescribed as fair compensation during the interim compensation term. Thus, allowing IXC's to pick and choose their compensation scheme would effectively repeal the interim compensation rule by depriving PSPs of the compensation to which they are entitled by that rule. Such standardless waivers also undermine the central purpose of the rule, and of Section

⁵ For this reason, the Commission authorized waivers of flat-rate compensation only with PSPs' consent. See Section I.

276(b)(1)(A) -- to ensure fair compensation of PSPs for calls for which compensation has been too long denied.

Telco does not propose any method for preventing such adverse and illegal effects. If some IXC's are allowed to pay less than their prescribed interim shares, then PSPs will not be fairly compensated unless other IXC's are required to pay more. Thus, if the Commission grants Telco's waiver it will be necessary to simultaneously redetermine the pro rata share of all the other IXC's in order to compensate for the reduction in Telco's payments to PSPs. Such a reworking of the Commission's interim compensation plan would raise troublesome issues. For example, the exact amount of the shortfall between Telco's per-call payments and its flat-rate payments will not be known until Telco has actually made per-call payments. At that point, other IXC's will protest against retroactive adjustment of their flat-rate shares. Alternatively, if the FCC attempts to use Telco's estimates of per-call volumes as the basis for recalculating flat-rate compensation, those estimates may be subject to challenge by other IXC's, and there will still be an issue concerning the adequacy of notice to other IXC's regarding changes in their shares.

All these issues of fairness to PSPs and other IXC's are unnecessarily worsened by Telco's dilatoriness in seeking a waiver. According to Telco, it has been recording all compensable calls since at least November 1996. Yet, Telco has waited six months to request a per-call waiver. If Telco had requested a timely waiver - or better yet, participated in the rulemaking or reconsideration phase - the Commission would have had an opportunity to fashion a policy to accommodate per-call compensation payments by

interested carriers.⁶ Telco's delay has unnecessarily compounded the problems. At this stage, any attempt to develop a per-call waiver policy that is fair to all parties would "impose greater transaction costs for all parties that outweigh its benefits, particularly because the flat-rate compensation mechanism is an interim mechanism that is scheduled to terminate in one year." Reconsideration, ¶ 129.

C. Granting Per-Call Waivers Would Deprive PSPs of the Opportunity to Prepare for Per-Call Compensation

The Commission established the one-year interim compensation period in order "[t]o ensure a relatively easy administration for all parties and to allow them to prepare for the per-call mechanism." Reconsideration, ¶ 129 (emphasis added). The one year hiatus is not solely for the benefit of IXC's - it also allows the PSPs time to prepare for the switch to per-call compensation. While it is true that IXC's have primary Commission-mandated call tracking responsibility, PSPs need to be able to develop procedures for checking the accuracy of IXC's call tracking. During the interim period, industry groups are also meeting to develop procedures for the administration of per-call compensation. If the Commission begins to permit IXC's to pay compensation on a per-call basis, without the consent of PSPs, PSPs would be deprived of the preparation time contemplated by the Order. In short, granting Telco's waiver request would have the effect of accelerating the November 1997 start date of per call compensation before all parties have fully prepared for the switch.

⁶ As discussed above, the Commission specifically considered but rejected a proposal for a part per-call, part flat-rate scheme during the interim period. Reconsideration, ¶ 119.

In addition, PSPs would face an effectively accelerated effective date for providing the screening codes mandated by the Order. When per-call compensation takes effect, PSPs are required to transmit screening codes which identify the PSP phones as payphones. Order, ¶ 98. Currently, PSPs will not have to have the ability to transmit these codes in place until November 7, 1997. There are a number of as yet-unresolved issues concerning the adequacy of the screening codes currently available from the LECs.⁷ Granting Telco's waiver would mean that PSPs are effectively required to transmit the codes beginning in November 1996.

* * *

In summary, Telco's waiver request is inconsistent with the public interest standard for waivers of Commission rules. Telco's circumstances are not demonstrably different from those of other IXCs that pay more flat-rate than per-call compensation. The logic of Telco's waiver would inevitably eviscerate the interim compensation rule, depriving PSPs of the compensation to which they are entitled under the rule and would unnecessarily complicate the interim regime. Further, granting the waiver would unreasonably deprive PSPs of time to prepare for per-call compensation.

III. IF ANY WAIVER IS GRANTED, IT MUST BE PROSPECTIVE ONLY

For the reasons already set out, the FCC should not grant Telco's waiver. However, Telco is not only asking that rules be waived, it is asking that rules be waived *retroactively*. Specifically, Telco seeks to pay compensation on a per-call basis retroactively

⁷ See, e.g., Letter to Regina M. Keeney from E.E. Estey, AT&T, May 23, 1997.

to November 6, 1996.⁸ In the event that the Commission does grant Telco's request, the Commission should grant it on a prospective basis only.

Telco's request need not have been retroactive. As discussed above, Telco's argument would have been more properly raised during the rulemaking process. Telco could have participated in the rulemaking process that led to the Order. Telco opted to remain silent and should not now benefit retroactively for having missed its opportunity to address issues regarding the interim compensation plan. According to its waiver request, Telco has had the ability to track calls at least since last November -- and presumably has been using this ability to track and record its calls from payphones. However, Telco presents no argument as to why it did not come forward earlier with its request. Instead, Telco has waited to file its waiver request until nearly six months *after* interim compensation has begun.

A. A Retroactive Waiver Is Not Authorized by Law

As discussed above, the waiver sought by Telco would effectively amend the Commission's interim compensation rule by reducing the compensation presented under the rule. Granting such a waiver retroactively would unlawfully deprive PSPs of a portion -- the difference between Telco's flat-rate and per-call payments -- of the compensation they are due under the interim compensation rule.

⁸ By contrast, the AT&T and Sprint waivers cited in Telco's waiver request were granted on a prospective basis only. Even the Oncor waiver was given prospective effect from the date of Oncor's request.

The Commission has not been given authority to change its rules retroactively as Telco requests. "If Congress has not conferred retroactive rulemaking power on an agency, the agency has none to exercise." Motion Picture Association of America, Inc. v. Oman, 969 F.2d 1154, 1155 (D.C. Cir. 1992) (citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)). See also Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1994). (The presumption against retroactivity is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.")

The presumption against retroactive rule enforcement is so strong that even when the retroactivity serves "entirely benign and legitimate purposes, [such as] to respond to "emergencies [and] to correct mistakes . . . [.] Congress first must make its intention [to authorize retroactivity] clear" Landgraf, 114 S. Ct. at 1497. If there is no clear evidence of such intent, retroactive enforcement is simply not allowed. Id. at 1508.

Neither the Order, the Communications Act nor any other act of Congress has conferred retroactive rulemaking authority on the Commission to retroactively change its interim compensation rules so as to reduce the prescribed compensation. Such changes to the interim rules can only be applied prospectively if at all. The Commission is not authorized to promulgate such a retroactive rule change. MPAA, 969 F.2d at 1157; Bowen, 488 U.S. at 208.

B. A Retroactive Waiver Is Not Justified

In matters involving APA-type adjudication, which is not this case, an agency may enjoy inherent authority to apply its decision retroactively. However, even in such

cases, courts have long hesitated to permit retroactive application absent a reasoned justification by the agency for doing so. See Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (remanding the Commission's retroactive enforcement of adjudicative action for failing to adequately explain why retroactive enforcement was necessary).⁹ Thus, the failure of an agency to consider and balance competing considerations to retroactive enforcement has led uniformly to reversal. *Id.* at n. 36. The test articulated by the Court in Yakima is that an adjudicative decision should not be allowed if the "mischief" caused by retroactivity outweighs "the salutary effort, if any, of retroactivity." Yakima, 794 F.2d at 746. See also, Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (providing five-part test for applying agency adjudicative decisions retroactively); cf. McElroy Electronics Corporation, 10 FCC Rcd 6762, 6767-6774 (1995); Review of Pioneer's Preference Rules, 9 FCC Rcd 605, 610 (1994).

Moreover, even if the Commission's decisionmaking powers for this type of request were deemed to be essentially "adjudicatory" in nature -- which they are not (see MPAA, 969 F.2d at 1157) -- and even if the requisite balancing analysis is performed, the Commission must conclude that the "mischief" caused by retroactive application outweighs its "salutary effects." By changing Telco's compensation obligations retroactively, the Commission would retroactively amend the compensation rule in a way that lowers the \$45.85 monthly charge established in the Order. It is unclear how that shortfall will be

⁹ By contrast, agencies have no discretion to retroactively apply a rule absent congressional authorization. See Bowen, 488 U.S. at 208.

recovered. Thus, if the Commission decided to retroactively grant Telco's waiver, the Commission also must reach back and retroactively increase the shares of the \$45.85 monthly charge owed by all the other IXCs to make up for the shortfall. That action would mean hundreds of thousands of dollars in unexpected obligations for those carriers who, unlike Telco, have accepted their flat-rate obligations.

Failure to make PSPs "whole" in this or any other way would unlawfully deprive them of the full compensation to which they are entitled under the rules established in the Order. In short, Telco's waiver request purports to solve one problem but would create innumerable new ones, and the cure is worse than the pain.

It would be fundamentally unfair to now tell PSPs that their reliance on the interim compensation set forth in the rule was misplaced. As the Supreme Court has stated, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf, 114 S. Ct. at 1497.

* * *

By retroactively changing Telco's interim compensation obligations, the Commission would be acting contrary to both the Act and the Commission's own rules and procedures as set out in the Order. "It is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned." Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir.

1986) (citing TelePrompter Cable Systems v. FCC, 542 F.2d 1379, 1378 (D.C. Cir. 1976).

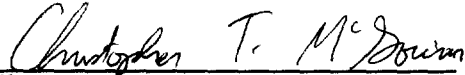
Virtually all FCC decisions granting retroactive changes in compensation were based on a statutory exemption of the petitioning IXC's, not a Commission grant of waiver. Excel and Midcom argued successfully that they were not operator services providers as covered by Section 226 of the Act. Policies and Rules Concerning Operator Service Access and pay telephone Compensation, 10 FCC Rcd 11457 (1995), 12 FCC Rcd 2571 (1997). This was a question of statutory definition and not application of a Commission rule. Here, Telco is requesting that a Commission rule be changed and that it be changed with retroactive effect.

CONCLUSION

The Commission prescribed interim compensation rules designed to fully implement the requirement that PSPs be compensated fairly. The interim rules are a transitional system that allows all parties to prepare for a per-call system beginning in November, 1997. The Commission specifically required PSP consent for waivers of the IXC responsibilities under the interim compensation plan. The PSPs have not granted this consent. Telco has not presented a valid argument showing why these rules should be waived. Even worse, Telco has asked for its waiver retroactively in contravention of law and Commission precedent. Accordingly, Telco's petition for waiver should be denied.

Dated: June 5, 1997

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich
Christopher T. McGowan
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

Attorneys for the American Public
Communications Council

CERTIFICATE OF SERVICE

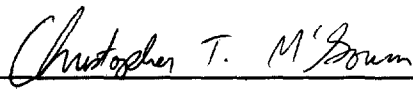
I, Christopher T. McGowan, hereby certify that a copy of the foregoing
Errata was sent to each of the following parties by hand delivery on this 5th day of June,
1997.

Michael Carowitz
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

International Transcription Service
2100 M Street, N.W., Room 140
Washington, D.C. 20037

Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

*Dana Frix
Pamela S. Arluk
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007



Christopher T. McGowan

* via U.S. Mail